(1)

91-643

Supreme Court, U.S.
FILED
OCT 15 1991
OFFICE OF THE CLERK

Application No. A-208

In The

Supreme Court of the United States

OCTOBER TERM, 1991

DORETHA BRYANT
Petitioner,

vs.

BROOKLYN BARBECUE CORPORATION, et. al.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LARRY DELANO COLEMAN, P.C.
Larry Delano Coleman #27575
SCARRITT BUILDING
818 Grand Avenue, #600
Kansas City, Missouri 64106
(816) 221-8600
(816) 221-9025 (FAX)

Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

i. Whether persons who have not been formally sued may be awarded sanctions pursuant to Rule 11, F.R.C.P.?

ii. Whether the attorneys for those persons who have not been formally sued may be awarded sanctions pursuant to Rule 11, F.R.C.P.?

iii. Whether the ignorance of an attorney with respect to the 120 day service requirement of Rule 4(j), F.R.C.P., supports the influence of a Rule 11 "improper purpose"?

iv. Where a complaint's dismissal is predicated upon a *procedural defect,* i.e., its non-service, *and not* because of the want of reasonable inquiry or that it was not well grounded in fact, may, nevertheless, Rule 11 sanctions be imposed, based upon *substantive allegations* and causes of action asserted in that complaint, the merits of which are judicially unknown?

PARTIES TO THE PROCEEDING

Petitioner:

Doretha Bryant

Respondents:

Brooklyn Barbecue Corporation
David Schlee
Stockyards Preservation Company
Preston Kerr (Deceased)
Judith Kerr
William Rauschelbach
Sandra Rauschelbach
Gary Berbiglia

TABLE OF CONTENTS

Page

Report of Opinions 1

Grounds of this Court's Jurisdiction 1

Regulatory Provisions involved in case 1

Concise Statement of the case 3

The Concise Argument 6-15

I. A writ of certiorari should be granted, herein, for the same essential reasons that certiorari was granted in *Donald J. Willy* 6-7

II. Supreme Court Rule 10 Rationale for Granting this Petition for a Writ of Certiorari 7-9

III. The precedents of this Court recoil against, and are repugnant to, the holding of the United States Court of Appeals for the Eighth Circuit in this case 10-15

A. Neither persons who have not been formally sued, nor their attorneys, may be awarded sanctions pursuant to Rule 11, F.R.C.P., for such involves an unnatural reading of the Rule and is in derogation of the plain meaning of the rule 10-11

B. The ignorance of an attorney with respect to the 120 day service requirement of Rule 4(j), F.R.C.P., does not support the inference of a Rule 11 "improper purpose" 11-14

C. Where a complaint's dismissal is predicated upon a *procedural defect*, i.e., its non-service, *and not* because of the want of reasonable inquiry or that it was not well grounded in fact, Rule 11 sanctions may not be imposed, based upon *substantive allegations* and causes of action asserted in that complaint, the merits of which are judicially unknown 14-15

Conclusion 15-16

Certificate of Service 17

TABLE OF CONTENTS–Continued

Appendix	Page
A. Order Denying Rehearing	A1
B. 8th Cir. Opinion @ 4/29/91	B1-B6
C. *KERR, ET AL. V. BRYANT*	C1-C3
D. District Court Opinion	D1-D11
E. Local Rule 35 (WDMo.)	E1
F. Order from Justice Blackmun	F1

TABLE OF AUTHORITIES

Bryant v. Brooklyn Barbecue Corp., 932 F.2d 697 (8th Cir. 1991) 1, 8, 12, 13, 15

Bryant v. Brooklyn Barbecue Corp., 130 F.R.D. 665 (W.D.Mo. 1990) 1 7, 14

Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S._____, 111 S.Ct. 922, 112 L.Ed. 2d 1140 (1991) 8, 9, 12, 13, 15

Chambers v. NASCO, Inc., 501 U.S._____, 111 S.Ct. 2123 115 L.Ed. 2d 27 (1991) 9, 13, 14

Cooter & Gell v. Hartmarx Corp., 496 U.S._____, 110 S.Ct. 2447, 110 L.Ed. 2d 359 (1990) 12, 13, 14

Davis v. Carl, 906 F.2d 533 (11th Cir. 1990) 14

Donald J. Willy, Petitioner v. *Coastal Corporation, et. al.*, 501 U.S._____, 115 L.Ed. 2d 994 (1991) .. 6, 9

Judith Kerr, et. al. v. Doretha Bryant, CV 89-6890 WMB, (CD Cal. 1990) 1, 5

Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 110 S.Ct. 459, 107 L.Ed. 2d 438 (1989) 8, 10, 11

Willy v. Coastal Corporation, et. al., 915 F. 2d 965 (5th Cir. 1990) 6, 7, 8

Zaldivar v. City of Los Angeles, 780 F. 2d 823 (9th Cir. 1986) 14

STATUTES

18 U.S.C. § 1961, *et seq.* 3, 4

28 U.S.C. § 1927 ..... 5, 15

28 U.S.C. § 1254 (1) 1

OTHER AUTHORITIES

Federal Rules of Civil Procedure ..... *Passim*

Rule 4(j) ..... *Passim*

Rule 11 ..... *Passim*

Local Rule 35 (WDMo.) 4, 5

Supreme Court Rule 10 ..... 7, 9

Supreme Court Rule 13.4 1

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPORTS OF OPINIONS

The opinion of the United States Court of Appeals for the Eighth Circuit, is reported in *Bryant v. Brooklyn Barbecue Corp.*, 932 F. 2d 697 (8th Cir. 1991). The opinion of the United States District Court for the Western District of Missouri is reported in *Bryant v. Brooklyn Barbecue Corp.*, 130 F.R.D. 665 (W.D.Mo. 1990). A correlative opinion in *Judith Kerr, et. al. v. Doretha Bryant*, CV 89-6890 WMB, (CD Cal. 1990), while officially unreported, is appended hereto and is also referenced in *Bryant v. Brooklyn Barbecue Corp.*, 932 F. 2d 697, 699, footnote 5 (8th Cir. 1991).

GROUNDS OF THIS COURT'S JURISDICTION

This Court's jurisdiction derives from an Order dated September 18, 1991, by Associate Justice Harry A. Blackmun, granting Petitioner's application for an extension of time within which to file this petition for a writ of certiorari, to the United States Court of Appeals for the Eighth Circuit, until October 15, 1991.

This Court's jurisdiction further derives from 28 U.S.C. 1254(1) and Rule 13.4, in that the Petitioner is seeking review, by writ of certiorari, of an opinion of the United States Court of Appeals for the Eighth Circuit, decided April 29, 1991, in *Bryant v. Brooklyn Barbecue Corp.*, 932 F. 2d 697 (8th Cir. 1991), as to which an Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc was entered on June 17, 1991.

REGULATORY PROVISIONS INVOLVED IN CASE

Rule 4(j), Federal Rules of Civil Procedure:

Summons: Time Limit for Service.

If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the

complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

Rule 11, Federal rules of Civil Procedure:

Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or

parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

CONCISE STATEMENT OF THE CASE

A lawsuit was filed on July 28, 1989, in the United States District Court for the Western District of Missouri by Doretha Bryant against Brooklyn Barbecue Corporation, David Schlee, Stockyards Preservation Company, Preston Kerr (Deceased), Judith Kerr, William Rauschelbach, Sandra Rauschelbach, and Gary Berbiglia, Case No. 89-0719-CV-W-8, alleging, *inter alia*, civil RICO violations, 18 USC § 1961, et seq.

That suit was not served upon any of the *putative* defendants within one hundred and twenty days (120) of its filing, as required by Rule 4(j), F.R.C.P. The summonses and complaint were not served upon any of the would-be defendants within 120 days of the lawsuit's filing, because undersigned counsel for the Petitioner was unaware of the 120 day service requirement imposed by Rule 4(j), F.R.C.P. Indeed, the *original* complaint and summonses were *never* served upon any prospective defendant.

On the same date that Ms. Bryant filed her action, one of the *putative* defendants, Respondent Preston Kerr, (now deceased), was being sentenced to two (2) years of probation, and being fined $10,000, in the United States District Court for the Western District of Missouri, pursuant to a plea agreement, for having engaged in "interstate transportation of money obtained by fraud from Mercantile Bank in connection with a $300,000 loan," in case number 88-00030-01-CR-W-3. Preston Kerr had been indicted *inter alia*, for "making a false statement to Republic Bank concerning a loan of $340,000 to *Brooklyn Barbecue Corporation*," which entity, along with its principals, i.e., the Kerrs, the Rauschelbachs, and Mr. Berbiglia, were also named defendants in Case No. 89-0719-CV-W-8.

The daily newspaper, *The Kansas City Star*, printed both stories, i.e., the fact of Ms. Bryant's lawsuit, and the fact of Preston Kerr's sentencing, in its July 29, 1989 issue.

On December 28, 1989, Petitioner Bryant filed a first amended complaint, upon which new summonses were issued, alleging, *inter alia*, civil RICO violations, 18 USC 1961, et seq. This first amended complaint, and the new summonses issued therewith, was served upon all of the defendants.

Meanwhile, on November 28, 1989, the putative defendants filed practically identical motions to dismiss the *original* complaint for failure to serve same within one hundred and twenty (120) days, pursuant to Rule 4(j), F.R.C.P., and they also moved for the imposition of sanctions upon Ms. Bryant and her attorney, pursuant to Rule 11, F.R.C.P., for her failure to serve them with the original complaint and summonses.

On March 14, 1990, the District Court, the Honorable Joseph E. Stevens, entered an Order, *inter alia, dismissing the original complaint,* without prejudice, pursuant to Rule 4(j), *quashing service of the first amended complaint,* and imposing sanctions upon Bryant and her attorney, pursuant to Rule 11, F.R.C.P.

On March 16, 1990, Ms. Bryant filed a *second* complaint, case no. 90-0265-CV-W-6, which was identical to her, now *quashed, first amended complaint* for damages and equitable relief, except for the words "first amended." This new complaint was timely and personally served upon all of the putative defendants in the original action.

This new complaint was assigned to the Honorable Howard Sachs, under the blind draw, employed for the distribution of cases among federal judges in the Western District of Missouri. And on March 22, 1990, pursuant to Local Rule 35, Judge Sachs transferred the "essentially refiled case" to the Honorable Joseph E. Stevens, the judge, who had been assigned the *original case,* No. 89-0719-CV-W-8.

By Order dated May 15, 1990, the District Court *imposed monetary sanctions* of $14,030 against plaintiff's attorney only; and *stayed* all proceedings in the new case, No. 90-0265-CV-W-6, contingent upon the payment of the assessment of $14,030, by Ms. Bryant's attorney, *to the putative defendants' attorneys,* in case number 89-0719-CV-W-8, the old, original case, in which there had never been any service of the *original* complaint.

Ms. Bryant moved the Court to alter or to amend its Order of May 15, 1990, and to stay execution thereon, by motion filed on May 25, 1990. In addition, on June 11, 1990, Ms. Bryant moved the Court to "re-transfer" the newly filed case, no. 90-0265-CV-W-6, to Judge Sachs, pursuant to Local Rule 35.

All of the aforesaid Orders from the United States District Court for the Western District of Missouri, were entered without the benefit of *any kind of hearing*, at any time, on any subject, and *without notice* from the Court that sanction would be imposed. The District Court judge never *read*, nor, by his own admission, inquired into the *merits* of either the original, first amended, or new complaint. Instead, that judge imposed sanctions based upon affidavits submitted by the Respondents saying how much the publicity generated by the lawsuit had hurt them.

Significantly, on November 28, 1989, *the same date* that all of the Respondents moved to dismiss Bryant's original lawsuit against them, and moved for sanctions, in *Missouri*, Respondent Judith Kerr, the wife of Respondent-felon Preston Kerr, filed a correlative lawsuit in the United States District Court for the Central District of *California*, against Doretha Bryant, for declatory judgment, respecting the ownership of certain stock in the Respondent Stockyards Preservation Company. That California lawsuit was dismissed with prejudice on May 31, 1990. However, that District Court refused to grant sanctions under Rule 11, F.R.C.P. or 28 U.S.C. § 1927 to Doretha Bryant or her undersigned attorney, who travelled 2,000 miles to California to get that frivolous lawsuit dismissed, for lack of personal jurisdiction over Doretha Bryant, as she was sued in a state with which she had *no contact* for thirty (30) years.

By order dated July 27, 1990, U.S. District Judge Joseph Stevens *overruled Ms. Bryant's motion to alter or to amend his Order of May 15, 1990*, which dismissed her original action pursuant to Rule 4(j), and granted sanctions to defendants' *attorneys*, pursuant to Rule 11. The Order also *denied Ms. Bryant's motion for stay of execution thereof*, with respect to the sanctions which had been imposed on Bryant's

attorney, *only;* and it also *denied Bryant's motion to re-transfer the newly filed case,* No. 90-0265-CV-W-6, to Judge Sachs.

An appeal to the United States Court of Appeals for the Eighth Circuit followed: case no. 90-2349. The case was argued on March 11, 1991, and a decision by a panel of that Court, consisting of Circuit Judge Bowman, Senior Circuit Judge Heaney, and Senior District Judge Larson, affirmed the decision of Judge Stevens in an opinion filed on April 29, 1991. An Order Denying Petition for Rehearing and Suggestions for Rehearing En Banc was entered on June 17, 1991.

THE CONCISE ARGUMENT

I.

A writ of certiorari should be granted, herein, for the same essential reasons that certiorari was granted in *Donald J. Willy.*

This Court has granted a petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit, limited to Question 1, presented by that petition, in the case *Donald J. Willy,* Petitioner v. *Coastal Corporation, et. al.*, No. 90-1150, 501, U.S._____, 115 L.Ed. 2d 994 (August 1991). That case below is reported at 915 F. 2d 965 (5th Cir. 1990).

That case, substantially like that for which review is sought herein, involves the propriety of the imposition of Rule 11 sanctions upon an attorney and his client by a district court judge, who also dismissed the underlying civil RICO action, where the district court judge lacked subject matter jurisdiction over the merits of the underlying claim. In the case herein, for which review is sought, the district court judge imposed Rule 11 sanctions upon the attorney and the client (later amended to just the attorney), and dismissed the underlying civil RICO action, even though:

1. The putative defendants were never served with the original summons or complaint;
2. The action was dismissed without prejudice for

want of service within 120 days, pursuant to Rule 4(j), F.R.C.P.;

3. The district court admitted, in its Order, that it had not read the complaint to determine whether the factual averments were well grounded in fact, *Bryant v. Brooklyn Barbecue Corp.*, 130 F.R.D. 665, 670 (W.D.Mo. 1990);

4. The district court never held any kind of hearing to determine whether the specific filing, the *original* complaint, was "baseless", or whether the sanction of attorney's fees was warranted;

5. The sanction of attorney's fees, pursuant to Rule 11, F.R.C.P., was awarded not to the putative defendants, the inchoate, would-be "parties", but to their attorneys; and

6. The sanction of attorney's fees was not confined to the cost of the "discrete event", the filing of the complaint, but shifted almost the entire fees associated with the underlying still-born litigation to petitioner's attorney.

The underlying District Court decision is cited as *Bryant v. Brooklyn Barbecue Corp.*, 130 F.R.D. 665 (W.D.Mo. 1990). At least in *Willy*, the defendants were served. At least in *Willy* the district court did conduct "two separate hearings", 915 F. 2d at 966. At least in *Willy* the sanction of attorney's fees was awarded to a "party", Coastal, as the "plain meaning" of Rule 11 contemplates, and not to Coastal's attorneys, as happened below herein. At least in *Willy* the district court judge read the complaint.

II

Supreme Court Rule 10 Rationale for Granting this Petition for a Writ of Certiorari.

A writ of Certiorari should and must issue to the United States Court of Appeals for the Eighth Circuit, because:

a. the actions of the district court, herein, were ex-

traordinary and unprecedented in the annals of American law;

b. the Petitioner, in her brief, will be able to show to this Court that the questions presented herein are at least as, and conceivably more compelling than, those presented in *Willy, supra;*

c. the 8th Circuit in affirming the district court so far departed or sanctioned departure by the lower court as to call for the exercise of this Court's power, Supreme Court Rule 10.1(a);

d. the 8th Circuit in affirming the district court has decided important questions of federal law, which have not been but should be decided by this court, Supreme Court Rule 10.1(c), i.e.:

> i. Whether persons who have not been formally sued may be awarded sanctions pursuant to Rule 11, F.R.C.P.?
>
> ii. Whether the attorneys for those persons who have not been formally sued may be awarded sanction pursuant to Rule 11, F.R.C.P.?
>
> iii. Whether the ignorance of an attorney with respect to the 120 day service requirement of Rule 4(j), F.R.C.P., *Bryant, supra,* 932 F. 2d at 699, supports the inference of a Rule 11 "improper purpose"?
>
> iv. Where a complaint's dismissal is predicated upon a *procedural defect,* i.e., its non-service, *and not* because of the want of reasonable inquiry or that it was not well grounded in fact, may, nevertheless, Rule 11 sanctions be imposed, based upon *substantive allegations* and causes of action asserted in that complaint, the merits of which are judicially unknown?

e. the 8th Circuit in affirming the district court has decided the foregoing questions in a manner which conflicts directly with applicable decisions of this court, to wit:

> i. *Pavelic & LeFlore v. Marvel Entertainment Group,* 493 U.S._____, 110 S.Ct. 459, 107 L.Ed.

2d 438 (1989) (if Rule 11 is given its "plain meaning" how can unserved persons, and even less so their attorneys be "parties", within the meaning of the Rule, and therefore entitled to sanctions?)

ii. *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S._____, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991) (if no examination of the merits of a "specific filing" is ever conducted, how can one reasonably draw the inference that it is not "well founded", and how can one reasonably infer that a specific filing is "baseless", when one has never read that filing?)

iii. *Chambers v. NASCO, Inc.*, 501 U.S._____, 111 S.Ct. 2123, 115 L.Ed.2d 27, 46 (1991) (if a "reasonableness standard", and not "subjective bad faith" is the appropriate test for gauging the propriety of imposing Rule 11 sanctions, how can an attorney, whose failure to serve a complaint within 120 days, out of ignorance of the Rule 4(j) requirement, support the inference of an "improper purpose"? And, what Rule 11 "notice requirements" *Id.*, 115 L.Ed.2d at 52, did the District Court afford Petitioner's attorney prior to imposing Rule 11 sanctions?)

Hence, granting this petition for a writ of certiorari will afford Petitioner an opportunity to more fully develop the themes outlined herein, in her brief and during oral argument, given this Court's disposition to revisit Rule 11, as evidenced by the very recent grant of certiorari in *Willy, supra*. Accordingly, petitioner now has reasonable and *renewed* cause to hope that this Court may likewise be disposed to grant certiorari herein. Especially is this so, where practically every element of Supreme Court Rule 10.1 is satisfied by the factual and legal circumstances inhering in this controversy.

III

The precedents of this Court recoil against, and are repugnant to, the holding of the United States Court of Appeals for the Eighth Circuit in this Case.

A. Neither persons who have not been formally sued, nor their attorneys, may be awarded sanctions pursuant to Rule 11, F.R.C.P., for such involves an unnatural reading of the Rule and is in derogation of the plain meaning of the rule.

In *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 110 S.Ct. 456, 107 L. Ed 2d 438 (1989), Justice Scalia, writing for the majority, stated:

> We give the Federal Rules of Civil Procedure their plain meaning . . . generally with them as with a statute, "[w]hen we find the term . . . unambiguous, judicial inquiry is complete.

Id. at 110 S.Ct. at 458. The opinion continues:

> In the Court of Appeals' words, "[law firm] responsibility for Rule 11 sanctions will create strong incentives for internal monitoring, and greater monitoring will result in improved pre-filing inquiries and fewer baseless claims." 854 F. 2d, at 1480. Even if it were entirely certain that liability on the part of the firm would more effectively achieve the purposes of the Rule, we would not feel free to pursue that objective at the expense of a textual *interpretation as unnatural* as we have described. Our task is to apply the text, not to improve upon it . . . The purpose of the provision in question, however, is *not reimbursement* but "sanction"; and the purpose of Rule 11 as a whole is to bring home to the individual signer his personal, nondelegable responsibility. (emphasis added.)

Id. at 459-460 Under Rule 11, Federal Rules of Civil Procedure, only "parties" are entitled to recover attorney's fees. The defendants were never "parties", because they were

never served, nor entered a general appearance. That rule states, in pertinent part:

> If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other *party or parties* the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

Since the duty of the District Court, and the 8th Circuit Court of Appeals, like that of the United States Supreme Court was "to apply the text, not to improve upon it". *Pavelic, supra,* 110 S.Ct. at 460. To ignore the phrase "party or parties" is also to engage in an "unnatural" construction of the rule. The language "parties or parties" is "unambiguous"; therefore, "judicial inquiry is complete". The defendants herein were never "parties". Therefore they were not entitled to sanctions afforded "parties" under Rule 11. Lastly, the purpose of Rule 11 is *"not reimbursement* but sanction". *Id.* The 8th Circuit, however, has approved of "reimbursement", to attorneys for persons who are not even "parties" within the plain meaning of Rule 11.

For this reason, a writ of certiorari must issue to the 8th Circuit Court of Appeals.

B. The ignorance of an attorney with respect to the 120 day service requirement of Rule 4(j), F.R.C.P., does not support the inference of a Rule 11 "improper purpose".

Is ignorance of an obscure subsection of constantly evolving federal rules a sanctionable offense? Is a violation of Rule 4(j), also necessarily a violation of Rule 11? Because the 8th Circuit says that they are, a writ of certiorari to that Court must issue.

During oral argument in response to a question from the panel at the 8th Circuit, Bryant's counsel explained that the original complaint was not served upon the would-be defendants, because he did not know about the 120 day service requirement imposed by Rule 4(j). In its opinion, the

panel, in reflecting upon this statement by Bryant's counsel, stated: "We have no reason to doubt it, and we appreicate the damaging effect the court's sanction has had on plaintiff's counsel, a sole practitioner of limited means". *Bryant, supra*, 932 F. 2d at 699. In posing its question during oral argument, the panel did no more than that prescribed in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S._____, 110 S.Ct. 2447, 2459 (1990):

> ". . . [t]o determine whether an attorney's prefiling inquiry was reasonable, a court must consider all the circumstances of a case. An inquiry that is unreasonable when an attorney has months to prepare a complaint may be reasonable when he has only a few days before the statute of limitations runs. In considering whether a complaint was supported by fact and law "to the best of the signer's knowledge, information and belief," a court must make some assessment of the signer's *credibility*." (emphasis added).

Well, if the distinguished panel which elicited the response from Bryant's counsel during oral argument, and which seized the opportunity (unlike the District Court, which never held a single hearing) to assess Bryant's counsel's demeanor and *credibility*, during oral argument, could find "no reason to doubt" the truth or veracity of the reason for non-service of the original complaint, it had no reason not to reverse the District Court.

"Improper purpose", within the meaning of Rule 11, subsumes and presumes the notion of "intent". Ignorance vitiates intent. And, intent vitiates ignorance. The two are, to say the least, antithetical. If one does not know a given thing, one cannot intend that which one does not know. This applies even though the "objective reasonableness standard" *Business Guides v. Chromatic Comm.*, supra, 112 L.Ed. 2d at 1161, applies to represented parties and attorneys alike. "Purpose" connotes knowingly, deliberately, and intentionally doing something. Ignorance is its opposite.

But, "deference" to *facts* is one thing; capitulation to an *"inference"*, *Bryant v. Brooklyn Barbecue Corp.*, supra, 932 F. 2d at 699-700, is quite another. Herein, without ever

conducting a hearing, without ever inquiring into the merits of the original, *never served* complaint, the District Court was left with nothing but an "inference". The District Court having failed to read the complaint, was certainly in no position to find any *facts*. "In the event that a District Court misapplies the Rule in a particular case, the error can be corrected on appeal." *Business Guides v. Chromatic Comm., supra*, 112 L.Ed. 2d at 1161. This is the case, and this is the *time* for that "correction" contemplated by the Supreme Court.

That vaunted and hypothetical line of defense against whim and caprice; that bulwark against arbitrariness and abuse; that rampart guarding due process and equal protection, which was supposed to have been manned by the Courts of Appeals, is now, overrun, in tatters, effectively, nonexistent. This whole troublesome matter of sanctions has been left to the District Courts–to do as they wish–as they are, after all, " 'on the front lines of litigation,' who are best situated to determine when a Rule 11 sanction is warranted. *Cooter*, 110 S.Ct. at 2460." *Bryant v. Brooklyn Barbecue Corp., supra*, 932 F. 2d at 700.

In conclusion, while ignorance of the 120 day service requirement may not constitute "good cause" for not serving the complaint, such as to avoid a dismissal without prejudice, pursuant to Rule 4(j), F.R.C.P., that same ignorance, even under the objective reasonableness standard, cannot support the imposition of sanctions under Rule 11.

If such were the case, *every procedural error* would be a sanctionable offense, because any attempt to distinguish between degrees of error, invites a nostalgic return to the subjective bad faith standard, which this court has already rejected. It is to be noted that the U.S. Supreme Court in *Chambers v. NASCO, Inc.*, 501 U.S._____, 111 S.Ct. 2123, 115 L.Ed. 2d 27, 46, n.11 (1991), states:

> Indeed, Rule 11 was amended in 1983 precisely because the *subjective bad-faith standard was difficult* to establish and courts were therefore reluctant to invoke it as a means of imposing sanctions.

Consequently, Rule 11 "imposes *an objective standard of reasonable inquiry* which does not mandate a finding of bad faith." *Id.* There was no "bad faith" below, and under the objective standard of reasonable inquiry, failure to ever serve a person with a complaint–i.e.–failure to sue them, cannot, logically or legally, be a sanctionable offense.

A writ of certiorari should therefore issue to the Court of Appeals for the Eighth Circuit.

C. Where a complaint's dismissal is predicated upon a *procedural defect*, i.e., its non-service, *and not* because of the want of reasonable inquiry or that it was not well grounded in fact, Rule 11 sanctions may not be imposed, based upon *substantive allegations* and causes of action asserted in that complaint, the merits of which are judicially unknown.

The District Court, in its opinion, made the following startling admission, preparatory to imposing Rule 11 sanctions upon Petitioner's counsel:

> "The instant case has obviously not proceeded to a stage where the court can determine, *based on its own examination of the FACTS, whether the original complaint was warranted.* (emphasis added).

Bryant v. Brooklyn Barbecue Corp., et. al., 130 F.R.D. 665, 670 (W.D.Mo 1990). QUERY: If, as the District Court admits, it could not, and, indeed, did not, "based on its own examination of the facts", "determine" whether the original complaint "was warranted", how could it determine, *absent a hearing of any kind*, ever, *Davis v. Carl*, 906 F. 2d 533, 538 (11th Cir. 1990); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S._____, 110 S.Ct. 2447, 2452 (1990) what that attorney's "*sole* purpose" was? And how could the 8th Circuit affirm such a holding in the face of such an admission?

The subjective intent of the attorney or litigant is not a basis for a Rule 11 violation when a complaint which complies with the standard of being "well-grounded in fact and warranted by . . . law" is filled. See, e.g. *Zaldivar v. City of Los Angeles* 780 F. 2d 823, 832 (9th Cir. 1985). As the District Court, by its own admission, never inquired into the *merits* of the original complaint, its sanction of Peti-

tioner's attorney, based upon its perception of that attorney's subjective intent, was legal error, warranting immediate correction. *Business Guides v. Chromatic Comm., supra*, 112 L.Ed. 2d. at 1161.

Rule 11 necessarily is directed at the *content* of pleadings and other papers. If a district court does not determine, based upon its own examination of the facts, whether a complaint is warranted, prior to imposing sanctions, it will have, necessarily, abused its discretion, even as it will have abdicated, or shirked, its judicial duty. And, in suffering it to do so, the 8th Circuit Court of Appeals has done likewise.

In sum, what was *in* the original complaint or what was *not in* the original complaint, is and was equally *irrelevant*, for the dismissal was not predicated upon the *content* of the complaint. However, paradoxically and predjudicially, the Rule 11 sanctions *were* predicated upon *content* of the original complaint, even though the contents were judicially unknown, and that original complaint was *never served*. Truly, this is a juridical nonsequitur!

For this reason, also, a writ of certiorari to the 8th Circuit Court of Appeals should, and must, issue.

CONCLUSION

Petitioner, herself, sought but was denied Rule 11 sanctions, and sanctions under 28 U.S.C. 1927, after one of the Respondents herein unsuccessfully sued her in California, in what was truly frivolous litigaton. See, *Bryant v. Brooklyn Barbecue Corp., supra*, 932 F. 2d at 699, footnote 5. If ever there was an archetype of the largely unprincipled whim, caprice, and vagaries of Rule 11, as administered by the nation's Courts of Appeals and District Courts, it is embodied in Bryant's attorney, who was sanctioned for suing, but not serving putative defendants in this case. Yet, who was denied Rule 11 and 28 U.S.C. § 1927 sanctions, in another case, that he had to travel 2,000 miles to get dismissed, after his client was sued and served, in a state with which she had had *no contact* for thirty (30) years. (A copy of that decision is appended hereto).

This is a case of first impression in the country, and it is therefore, necessarily, an extraordinary case, warranting the grant of a petition for writ of certiorari; or, the holdings of the lower courts shall remain forever a blight on the face of the American judiciary, until the memory of a man runneth naught to the contrary.

WHEREFORE, Petitioner prays for relief consistent with the foregoing, and prays that a writ of certiorari issue to the United States Court of Appeals for the 8th Circuit.

LARRY DELANO COLEMAN, P.C.
Larry Delano Coleman #27575
SCARRITT BUILDING
818 Grand Avenue, #600
Kansas City, Missouri 64106
(816) 221-8600
(816) 221-9025 (FAX)

Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that 3 copies of the foregoing Petition for Writ of Certiorari were mailed this 15TH day of OCTOBER 1991 to:

DAVID F. OLIVER, Esq.
SMITH GILL FISHER & BUTTS
3500 ONE KANSAS CITY PLACE
1200 MAIN STREET
KANSAS CITY, MISSOURI 64105
(816) 474-7400
ATTORNEY FOR DAVID SCHLEE

BRUCE C. HOUDEK, Esq.
JAMES MILLERT, HOUDEK, TYRL & SOMMERS
500 SCARRITT BUILDING
818 GRAND AVENUE
KANSAS CITY, MISSOURI 64106
(816) 842-2527
ATTORNEYS FOR STOCKYARDS PRESERVATION COMPANY, JUDITH KERR AND PRESTON KERR (DECEASED)

JOE W. COLEMAN, Esq.
MCDOWELL RICE AND SMITH
120 W. 12TH STREET, 13TH FLOOR
TWELVE WYANDOTTE PLAZA
KANSAS CITY, MISSOURI 64105
(816) 221-5400
ATTORNEY FOR BROOKLYN BARBECUE CORPORATION, WILLIAM RAUSCHELBACH, SANDRA RAUSCHELBACH AND GARY BERBIGLIA

LARRY DELANO COLEMAN, Esq.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 90-2349 WM

DORETHA BRYANT
Appellant,

vs.

BROOKLYN BARBECUE CORPORATION,
WILLIAM RAUSCHELBACH,
SANDRA RAUSCHELBACH,
GARY BERBIGLIA,
PRESTON KERR,
JUDITH KERR,
ARTHUR BRYANT'S INCORPORATED,
DAVID SCHLEE AND
STOCKYARD PRESERVATION,
Appellees

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC.

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

June 17, 1991

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2349

DORETHA BRYANT
Appellant,

vs.

BROOKLYN BARBECUE CORPORATION,
WILLIAM RAUSCHELBACH,
SANDRA RAUSCHELBACH,
GARY BERBIGLIA,
PRESTON KERR,
JUDITH KERR,
ARTHUR BRYANT'S INCORPORATED,
DAVID SCHLEE AND
STOCKYARD PRESERVATION,
Appellees

Submitted: March 11, 1991
Filed: April 29, 1991

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

Before BOWMAN, Circuit Judge, HEANEY, Senior Circuit Judge, and LARSON,* Senior District Judge.

LARSON, Senior District Judge

The sole issue raised in this appeal is whether the district court abused its discretion in imposing sanctions on plaintiff's counsel under Fed. R. Civ. P. 11. Because we find no

*The HONORABLE EARL R. LARSON, Senior United States District Judge for the District of Minnesota, sitting by designation.

abuse of discretion based on the record presented on appeal, we affirm.

On July 28, 1989, plaintiff Doretha Bryant filed a complaint against defendants Brooklyn Barbecue Corporation, Arthur Bryant's Inc., the Stockyard Preservation Co., and various officers and directors of these companies. The complaint in this action, Civ. No. 89-0719, alleged defendants had engaged in a pattern of racketeering activity designed to deprive plaintiff of her interest in the property she inherited from her uncle, Arthur Bryant, the famous Kansas City barbecue restaurateur. The complaint was not served within the 120 days provided in Fed. R. Civ. P. 4(j),[1] and defendants filed a motion to dismiss the complaint and for sanctions pursuant to Fed. R. Civ. P. 11.[2] In response, plaintiff's counsel indicated he was engaged in other state court actions involving many of the same parties and he intended to file a first amended complaint within two weeks "now that the necessary groundwork ha[d] been done."

---

1 Fed. R. Civ. P. 4(j) provides:

If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

2 Fed. R. Civ. P. 11 provides in relevant part:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

The district court[3] granted the defendants' motion to dismiss, finding plaintiff had failed to demonstrate good cause for her failure to serve the complaint. The district court also ruled sanctions were appropriate because plaintiff's counsel effectively admitted he had conducted the "reasonable inquiry" required by Rule 11 only *after* the original complaint had been filed and further admitted that the original complaint had been filed to coincide with the criminal sentencing of one of the defendants. Under these circumstances, the court concluded the original complaint was filed solely for an improper purpose, namely to attract publicity and to harass the defendants.

After giving plaintiff an opportunity to respond to the affidavits presented by defendants regarding the amount of their attorney's fees, the court assessed $14,030 in sanctions against plaintiff's attorney.[4] In the meantime, plaintiff's counsel had initiated a second action by refiling the amended complaint he had prepared to file in the original action. In its order imposing sanctions, the court stayed all proceedings in this second action, Civ. No. 90-0265, until the $14,030 had been paid. Plaintiff's request to alter or amend the court's imposition of sanctions was denied, and plaintiff appealed.

Subsequent to the filing of this appeal, plaintiff and defendants stipulated to a dismissal of the second action, Civ. No. 90-0265, without prejudice, and the court granted the dismissal along with plaintiff's counsel's motion to withdraw as counsel in that case. Thus, both the original complaint and the amended complaint have now been dismissed without prejudice. Plaintiff does not challenge either of these dismissals. Plaintiff does contend that the district court's imposition of Rule 11 sanctions should be reversed.

---

3 The Honorable Joseph E. Stevens, Jr., United States District Judge for the Western District of Missouri.

4 Plaintiff's counsel had requested that any sanctions be imposed against him and not his client, because "it was he who did not serve the original complaint, not his client. She is blameless."

II.

Because the issues involved in determining whether an attorney has violated Rule 11 "involve 'fact-intensive, close calls,' " we review all aspects of the district court's order under an abuse of discretion standard. *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. 2447, 2460, 2461 (1990). Plaintiff's counsel argues the court lacked jurisdiction to impose sanctions because defendants in this case were never served with the original complaint, and hence could not be "parties" entitled to an award of expenses under Rule 11. We find the Supreme Court's decision in *Cooter* resolves this issue in favor of the court's authority to award sanctions even though the original complaint was dismissed prior to service on the defendants. *Id.* at 2454-57. The violation in this case occurred when the original complaint was filed for an improper purpose and without the "reasonable inquiry" required by Rule 11. Under these circumstances,

> [t]he district court's jurisdiction, invoked by the filing of the underlying complaint, supports consideration of both the [motion to dismiss] the action and the motion for Rule 11 sanctions arising from that filing.

Id. at 2455.

With regard to whether the court's finding of a Rule 11 violation was justified, plaintiff's counsel argues that the court erred in imposing sanctions without ever conducting a hearing or inquiring into the merits of the claims raised in plaintiff's complaint. Counsel never requested such a hearing before the district court, however, nor did he offer an affidavit to the court which explained either the investigation he had undertaken prior to filing the original complaint or the factual basis for the allegations made. *Cf. Cooter*, 110 S.Ct. at 2452 (counsel filed three affidavits setting forth prefiling research). The inference the district court drew from the papers counsel had filed was that counsel knew he had not conducted a reasonable inquiry of the facts and the law prior to filing the original complaint, but filed it prematurely so as to benefit from the publicity generated by defendant Preston Kerr's criminal sentencing on charges relating to bank fraud.

According to the affidavits presented by defendants William Rauschelbach, Sandra Rauschelbach, and Gary Berbiglia, this premature filing was harmful to them. Defendant Rauschelbach, for example, stated that many regular customers of his Golden Ox restaurant had asked about the lawsuit and "have made comments about me being a racketeer." Defendants' affidavits further set forth details regarding the opportunities to serve the complaint which had been available to plaintiff's counsel, opportunities which included at least one face-to-face meeting in connection with the state court litigation involving plaintiff and these defendants. Defendants' affidavits indicated that plaintiff had served them with papers in connection with other litigation since the original complaint had been filed, but had made no attempt to serve the original complaint within the 120 days allowed by Rule 4(j).

Plaintiff's counsel states that he fully intended to file and serve an amended complaint, and attempted to do so after the 120 days had passed. Counsel explained at oral argument that he simply was unaware of the 120 day rule. Although counsel never advanced this explanation to the district court, we have no reason to doubt it, and we appreciate the damaging effect the court's sanction has had on plaintiff's counsel, a sole practitioner of limited means. Plaintiff's counsel claims the result in this case is particularly unfair because plaintiff was denied *her* request for attorney's fees incurred in obtaining dismissal of a suit brought in California by Judith Kerr, one of the defendants herein.[5]

Our role in reviewing the district court's order imposing sanctions in this case is, however, quite limited. Recogniz-

---

5 The papers filed by plaintiff's counsel in the California action indicated that Ms. Bryant was a lifelong resident of Kansas City, Missouri, and had "never set foot in California for over thirty years." The California district court judge concluded "[t]he uncontroverted evidence, therefore, is that Bryant has not had sufficient contacts with the state of California to permit the court's exercise of either general jurisdiction or specific jurisdiction over her in this action." The court refused without comment Bryant's request for Rule 11 sanctions. *See Kerr v. Bryant*, Civ. No. 89-6890 (C.D. Cal. May 31, 1990).

ing that "fact-bound resolutions cannot be made uniform through appellate review, de novo or otherwise," the Supreme Court has instructed appellate courts to defer to the determinations of those "on the front lines of litigation," who are best situated to determine when a Rule 11 sanction is warranted. *Cooter,* 110 S.Ct. at 2460. Defendants' counsel in this case submitted affidavits in support of their request for approximately $24,000 in attorney's fees incurred since the filing of plaintiff's original complaint. The district judge concluded an award of a portion of these fees was reasonable based on the record before him, and we can find no abuse of discretion in this judgment.

In addition to their award of fees at the district court level, defendants have also requested this Court to award them attorney's fees on appeal pursuant to Fed. R. App. 38.[6] Because we find plaintiff's appeal was *not* frivolous, we deny defendants' Rule 38 motion. Plaintiff's cross-motion for sanctions is also denied. The judgment of the district court is affirmed, and each party shall bear his, her, or its own costs on appeal.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

---

6 Fed. R. App. P. 38 provides:

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JUDITH KERR AND HAL JUERGENS,
Plaintiffs,

vs.

DORETHA BRYANT,
Defendant.

CV 89-6890 WMB

ORDER

BACKGROUND

In this action, plaintiffs Judith Kerr ("Kerr") and Hal Juergens ("Juergens") are suing Doretha Bryant to resolve the disputed ownership of shares of stock of The Stockyards Preservation Company ("SPC"), a Missouri corporation with its headquarters in Santa Barbara, California. Plaintiffs allege that except for one share which is owned by William Rauschelbach, all of the outstanding shares of SPC stock are owned by plaintiffs, with Kerr owning 4,500 shares and Juergens owning 1,000 shares. Plaintiffs further allege that defendant Bryant has repeatedly published claims that she and another person are the owners of SPC stock, and that by publishing those false claims, Bryant is interfering with the ability of plaintiffs, as owners of SPC, to manage and operate the company. By way of relief, plaintiffs are seeking 1) a declaration that plaintiffs are owners of all but one share of SPC stock, and 2) an injunction restraining Bryant and her agents from making false claims about the ownership of SPC stock.

Plaintiffs previously moved for entry of default judgment against Bryant on the grounds that Bryant failed to an-

swer the complaint. A hearing on that motion was scheduled for April 30, 1990, at which time Mr. Larry Coleman, an attorney licensed to practice in Missouri, unexpectedly appeared on behalf of Bryant. The court then continued the hearing to allow Bryant to file a motion to set aside the default.

Bryant now moves to quash the service of process upon her and to dismiss this action for lack of personal jurisdiction. Bryant also moves for an award of sanctions against plaintiffs, pursuant to Fed. R. Civ. P. 11. Plaintiffs have renewed their motion entry of default judgment.

DISCUSSION

Plaintiffs, as the parties seeking to invoke the court's jurisdiction, bear the burden of establishing that personal jurisdiction exists. *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986). On a motion to dismiss, plaintiffs are "obligated to come forward with facts, by affidavit or otherwise, supporting personal jurisdiction." *Id.* (quoting *Ampa Marketing Systems, Inc. v. Jobar International, Inc.*, 551 F.2d 784, 787 (9th Cir. 1977)).

To establish personal jurisdiction, plaintiffs must allow that the law of the forum state confers personal jurisdiction, and that its exercise would not be inconsistent with federal due process. *Id.* Under California law, if the nonresident defendant's activities within the state are "substantial" or "continuous or systematic," there is a sufficient relationship between the defendant and the state to support jurisdiction even if the cause of action is unrelated to the defendant's forum activities. *Scott*, 792 F.2d at 927. This is commonly referred to as "general jurisdiction." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 104 S.Ct. 1868, 1872 & n.9 (1984). If the defendant lacks sufficient ties to support general jurisdiction, a court may still exercise personal jurisdiction over the defendant if the cause of action arises out of or is related to the defendant's forum activities, *Scott*, 792 F.2d at 927. This is commonly referred to as "specific jurisdiction." *Helicopteros*, 104 S.Ct. at 1868 and n.8.

The complaint says nothing about defendant Bryant's con-

nection to the state of California. Nor have plaintiffs submitted any evidence outside the pleadings to establish a basis for this court's jurisdiction over Bryant, even after having been allowed additional time by the court to do so.

In contrast, Bryant has submitted a declaration in which she states (1) she is a lifelong resident and citizen of Kansas City, Missouri; (2) she has never set foot in California for over thirty years; (3) she does not own any property in California; (4) she has never communicated with the media in California; and (5) she has never put any document or thing in the stream of commerce purposely directed at California.

The uncontroverted evidence, therefore, is that Bryant has not had sufficient contacts with the state of California to permit the court's exercise of either general jurisdiction or specific jurisdiction over her in this action.

Accordingly, Bryant's motion to quash the service of process upon her, and Bryant's motion to dismiss are granted. Bryant's motion for Rule 11 sanctions is denied. Plaintiffs' motion for entry of default judgment is denied.

Dated: May 31, 1990

WM. MATTHEW BYRNE, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT

W.D. MISSOURI, W.D.

DORETHA BRYANT
Plaintiff,

vs.

BROOKLYN BARBECUE CORPORATION, et. al
Defendants

No. 89-0719-CV-W-8

March 14, 1990.

Alleged owner of personal property devised to her by barbecue restaurateur filed RICO action against defendants who allegedly engage in pattern of racketeering activity to deprive plaintiff of that interest. On defendant's motion to dismiss and for sanctions the District Court, Stevens, J., held that: (1) inquiry into whether defendants were prejudiced by plaintiff's failure to effect service within 120 days was not appropriate where plaintiff failed to establish good cause for delay; (2) service of amended complaint had to be quashed since good cause for failure to timely serve original complaint was not established; and (3) imposition of Rule 11 sanctions was warranted in light of failure to conduct reasonable inquiry before filing complaint and evidence that complaint was filed to obtain publicity and harass defendants.

Motions granted.

1. Federal Civil Procedure Key 417

A plaintiff's desire to amend her complaint before effecting service did not constitute good cause for failure to serve defendants within 120 days of the filing of the original complaint. Fed. Rules Civ. Proc. Rule 4(j), 28 U.S.C.A.

2. Federal Civil Procedure Key 417

Inquiry into whether defendants were prejudiced by a plaintiff's failure to effect service within 120 days was not appropriate where the plaintiff had failed to establish good cause for the delay; plaintiff admitted she made no attempt to serve defendants within the 120-day period because she knew she would ultimately file an amended complaint containing more specific factual allegations. Fed.Rules Civ.Proc.Rule (j), 28 U.S.C.A.

3. Federal Civil Procedure Key 417

Service of an amended complaint had to be quashed even though service on that complaint was successful where plaintiff failed to establish good cause for failure to timely serve original complaint. Fed.Rules Civ.Proc.Rule 4(j), 28 U.S.C.A.

4. Federal Civil Procedure Key 2721

Rule 11 sanctions could be imposed against plaintiff whose attorney admitted that he did not conduct factual inquiry allowing him to plead claims with sufficient particularity until after original complaint was filed, particularly in light of plaintiff's admission that pleading was filed to coincide with sentencing of one of the defendants and that plaintiff made absolutely no effort to serve complaint until after it was filed, suggesting complaint was filed solely to attract publicity and to harass defendants. Fed.Rules Civ. Proc.Rule 11, 28 U.S.C.A.

Larry Delano Coleman, Larry Delano Coleman, P.C., Kansas City, Mo., for plaintiff.

Joe W. Coleman, McDowell, Rice & Smith; Bruce C. Houdek, James, Millert, Houdek, Tyrl & Sommers; David Field Oliver, Smith, Gill, Fisher & Butts, Kansas City, Mo., for defendants.

ORDER

STEVENS, District Judge.

Plaintiff filed this lawsuit pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964, alleging that defendants engaged in a pattern of racketeering activity to deprive plaintiff of her interest in

certain personal property devised to her by Arthur Byant, the legendary Kansas City barbecue restaurateur. The case is currently before the court on the motion of defendants[1] to dismiss plaintiff's complaint for failure to serve it in a timely fashion or, alternatively, for failure to prosecute; defendants' motion for sanctions pursuant to Fed.R.Civ.P. 11; and defendants' motion to quash the purported service of plaintiff's amended complaint. In addition to defendants' motions, plaintiff has filed a motion for default judgment and for sanctions against defendant David Schlee.

I. Motion to Dismiss

Plaintiff filed her complaint on July 28, 1989. In support of their motion to dismiss, defendants argue that plaintiff made absolutely no effort to serve the complaint within the 120 day period provided in Fed.R.Civ.P. 4(j). Indeed, plaintiff concedes this fact in her Suggestions in Opposition to the Motions to Dismiss, dated December 13, 1989,[2] where she states that "[t]here is no question but that the complaint filed on July 28, 1989 has not been served." Fed.R.Civ.P. 4(j) provided that

> [i]f a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice. . . .

Thus, unless plaintiff can establish that there was "good cause" for her failure to serve the complaint within the 120 day period, defendants' motion must be granted.

---

1 Actually, several different motions were filed, each containing the same argument. One motion was filed by defendants Preston Kerr and Judith J. Kerr, one by defendants Brooklyn Barbeque Corporation, William Rauschelbach, Sandra Rauschelbach, and Gary Berbiglia, one by Stockyards Preservation Co., and one by David Schlee. Only defendant Arthur Bryant's Inc. has failed to file a motion to dismiss. Since the motions concern identical issues, the court will refer only to one motion.

2 December 13, 1989 is 138 days after the complaint was filed.

The 120 day limitation contained in Fed.R.Civ.P. 4(j) "is intended to force parties and their attorneys to be diligent in prosecuting their cause of action. . . ." *Townsel v. Contra Costa County, California*, 820F.2d319, 320 (9th Cir.1987) (quoting *Wei v. State of Hawaii*, 763 F.2d 370, 373 (9th Cir.1985). *See also Motsinger v. Flynt*, 119 F.R.D. 373, 375 (M.D.N.C.1988) ("Rule 4(j) is specifically designed to encourage and prod counsel into expediting service in order that the merits of the case may be reached."); *Baden v. Craig-Hollum, Inc.*, 115 F.R.D. 582, 584 (D.Minn.1987) ("the purpose of Rule 4(j) is to force parties and their attorneys to be diligent in prosecuting their causes of action"); *Boykin v. Commerce Union Bank of Union City, Tennessee*, 109 F.R.D. 344, 345 (W.D.Tenn. 1986) (legislative history of the amendment adding 120 day period to Rule 4(j) establishes that purpose of the rule is to "encourage prompt movement of civil actions in the federal courts").

In the instant case plaintiff argues that the complaint should not be dismissed because good cause exists for not accomplishing service within the 120 day period. Specifically, plaintiff argues that

> the RICO [complaint] has not been served, because counsel intends to file a first amended complaint within two weeks of the filing date of this response, sufficient information having been gathered to plead with particularaly (sic) the averments needed to establish antitrust violations securities fraud, common law fraud, Civil RICO, and other causes of action. . . .

Suggestion in Opposition to Defendants' Motions to Dismiss at ¶ 11. Plaintiff also notes that the complaint was not filed within the 120 day period because of the "sheer massiveness" of the facts underlying the complaint and because it "was filed to coincide with the sentencing of the brilliant, though malevolent, Preston Kerr, the principal owner of the Stock Yard [sic] Preservation Company. . . ." [3]

---

3 Both Kerr and Stockyard Preservation Co. are defendants in the instant case.

In addition to arguing that "good cause" exists for failure to serve the complaint within 120 days, plaintiff maintains that the complaint should not be dismissed because she filed a first amended complaint on December 28, 1989.[4] Several defendants have been served with the amended complaint and have filed motions to quash service, arguing that the amended complaint was not properly served since no effort had been made to serve the original complaint within the 120 day period provided under Fed.R.Civ. P. 4(j).

As an initial matter, the court concluded that plaintiff has not established the "good cause" necessary to overcome defendants' motion to dismiss the original complaint for failure to serve it in a timely manner. *See Ouzts v. Cummins*, 825 F.2d 1276, 1278 (8th Cir.1987). Although neither the language of the rule nor its legislative history define "good cause," most courts applying the term have found that good cause will be found only if plaintiff has been diligent in attempting to serve the complaint. The "inadvertence of counsel does not qualify as good cause." *Baden*, 115 F.R.D. at 586. Thus, "[l]ack of effort or half-hearted efforts on the part of a plaintiff [to serve the complaint] will likely lead to dismissal." *Motsinger*, 119 F.R.D. at 376, n.2.

[1] In the instant case plaintiff admits she made no attempt to serve defendants within the 120 day period because she knew she would ultimately file an amended complaint containing more specific factual allegations. In a case with similar facts, the Ninth Circuit held that a plaintiff's "desire to amend [her] complaint before effecting service does not constitute good cause." *Wei v. State of Hawaii*, 763 F.2d 370, 372 (9th Cir.1985).

---

4 Plaintiff filed a motion for leave to file the fist amended complaint on December 13, 1989. That motion was never ruled by the court but the Clerk's Office filed the amended complaint on December 28, 1989. Plaintiff argues that the amended complaint was correctly filed, without a ruling on the motion for leave, because Fed.R.Civ.P. 15(a) provides that a party may amend a pleading "once as a matter of course at any time before a responsive pleading is served. . . ." As the court's discussion, *infra* at 668-69, indicates the reasoning of plaintiff's argument is flawed in a situation such as this one, where the original complaint was not timely served, rendering Fed.R.Civ.P. 15(a) inapplicable.

[2] Plaintiff also argues that defendants' motion should be denied because plaintiff was not prejudiced by the delay. Even assuming, *arguendo*, that defendants did not suffer any prejudice by having a complaint on file alleging that they participated in racketeering activities, this court would reject plaintiff's argument because "the absence of prejudice is *not* of aid to a faulty plaintiff who presents no justifiable reason for his lack of diligent and timely conformance with . . . Rule 4(j)." *Quann v. Whitegate-Edgewater*, 112 F.R.D. 649, 660 D.Md.1986) (emphasis in original). *Accord Baden*, 115 F.R.D. at 586, n.4 (neither language of rule nor its legislative history requires a showing of prejudice). Even those courts finding that a prejudice inquiry is relevant, however, have held that "the plain language of Rule 4(j) leaves no room for excusing untimely service where there is total failure to show good cause." *Delicata v. Bowen*, 116 F.R.D. 564, 566 (S.D.N.Y.1987). Thus, even if this court found that an inquiry into whether defendants were prejudiced by the delay in service was relevant the court would not engage in such an inquiry since plaintiff has not established good cause for the delay.

[3] Having found that good cause does not exist for the delay in serving the defendants with the original complaint, the court must next determine what effect, if any, the filing of the amended complaint more than 120 days after the filing of the original complaint has on defendants' motion to dismiss. Plaintiff relies on *Ahmad v. Independent Order of Foresters*, 81 F.R.D. 722 (E.D.Pa.1979), *aff'd without opinion*, 707 F.2d 1399 (3rd Cir.1983), in support of her argument that her claims are not barred by the failure to serve the original complaint within the 120 day period. Specifically, plaintiff argues that her claims may not be dismissed since she later successfully served the amended complaint.

Plaintiff in *Ahmad* filed his complaint on June 27, 1975. *Id.* at 725. Although a special process server was appointed five days later, he never succeeded in serving defendant. *Id.* Plaintiff's attorney then withdrew from the case and, while substitute counsel was ultimately obtained, it was

March 8, 1977 before the amended complaint was filed. *Id.* Defendant moved to dismiss the amended complaint arguing that it should not have been filed without leave of court since the original complaint was never served. *Id.* at 726. The court rejected this argument, noting that under Fed.R.Civ.P. 15(a) a party had the opportunity to amend its complaint once as a matter of course at any time before a responsive pleading had been filed. *Id.*

Ahmad is distinguishable from the instant case, however, since it was decided prior to the 1983 amendment to Fed.R.Civ.P. 4(j), adding the 120 day limit on serving a complaint. Thus, unlike plaintiff in the instant case, plaintiff in *Ahmad* was under no time constraint to serve his original complaint. Since the 1983 amendment to Fed.R.Civ.P. 4 (j) took effect, courts considering whether a plaintiff may serve an amended complaint outside of the 120 day limit have uniformly held that the amended complaint may not be served unless good cause is shown for the failure to serve the original complaint within the 120 day period. *See e.g., Smith v. Pennsylvania Glass Sand Corp,* 123 F.R.D. 648, 650 (N.D.Fla.1988) ("after the Rule 4(j) 120 day period has expired, a trial judge may grant an extension of time to serve a complaint only when the party has satisfied Rule 4(j)'s good cause requirement"); *Baden,* 115 F.R.D. at 586, n.3 amended complaint does not toll the 120 day period as to previously named defendants and "[t]he appropriate course is for plaintiff to amend the original complaint after serving it upon the original defendants"); *Boykin,* 109 F.R.D. at 350 (extension of time in which to serve complaint after 120 day period has expired will be granted only if moving party establishes good cause for the failure to comply with Fed.R.Civ.P. 4(j)).

This interpretation[5] of the good cause requirement of Fed.R.Civ.P. 4(j) comports with common sense: if a plaintiff

---

5 Courts have reached this result after comparing the "good cause" language of Rule 4(j) with Fed.R.Civ.P. 6(b), which provides that a court may grant an enlargement of time to perform an act after the allotted time has expired "where the failure to act was the result of excusable neglect." The courts have concluded that the excusable neglect standard must at least equal the good cause language or the 120 day time limitation would lose all meaning. *See, e.g., Baden,* 115 F.R.D. at 585, n.2; *Delicata,* 116 F.R.D. at 566.

who had not shown good cause for failing to serve a complaint with the 120 day period was allowed to file an amended complaint after that time period had passed, there would be no incentive to serve the complaint in a timely manner and the purpose of Fed.R.Civ.P. 4(j), to encourage prompt service, would be emasculated. Consequently, this court concludes that plaintiff's attempt to file and serve her amended complaint after the 120 day period had passed does not preserve her original cause of action and service of the amended complaint must be quashed.

II. Motion for Sanctions

Defendants also seek sanctions against plaintiff and her attorney, pursuant to Fed.R.Civ.P. 11, for having to respond to plaintiff's original complaint. Specifically, defendants argue that the original complaint, filed on July 28, 1989, was filed for the sole purpose of harassing defendants and did not have a reasonable basis in law or in fact. Fed.R.Civ.P. 11 requires that a court assess sanctions if a pleading, motion or other paper is signed by an attorney or party and is not well grounded in fact or warranted by existing law or if it is "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in cost of litigation." Fed.R.Civ.P. 11.

Defendants argue that sanctions must be awarded in this case because plaintiff admits that the plaintiff chose to file the complaint so that it would coincide with the sentencing of Preston Kerr, a defendant in this case, and because plaintiff admits that it was not until after the original complaint was filed and the amended complaint was being contemplated that plaintiff had gathered sufficient information to plead with particularity the requisite elements of a RICO or antitrust claim. *See* Plaintiff's Suggestions in Opposition to the Motion to Dismiss at ¶4, 11. Defendants conclude that the only inference that may be drawn from these admissions is that plaintiff filed the original complaint for the sole purpose of garnering publicity favorable to her cause and that plaintiff's attorney did not conduct sufficient research prior to filing the original complaint to determine if the allegations were well grounded in fact.

This court has recently noted that "[i]n determining whether an award of sanctions is appropriate . . . [a] court must consider 'whether the person who signed the pleading conducted a reasonable inquiry into the facts and law supporting the pleading.' " *Naylor v. Lee's Summit Reorganized School District R-7,* 703 F.Supp. 803, 820 (W.D.Mo.1989) (quoting *O'Connell v. Champion International Corp.,* 812 F.2d 393, 395 (8th Cir.1987)). This inquiry is objective, rather than subjective. *Equal Employment Opportunity Commission v. Milavetz and Associates, P.A.,* 863 F.2d 613, 615 (8th Cir.1988). Since the rule requires the individual signing the document to conduct a reasonable inquiry, a party filing a complaint hoping that discovery will reveal facts supporting the allegations may be sanctions. *Balfour Guthrie, Inc. v. Hunter Marine Transport, Inc.,* 118 F.R.D. 66, 74 (M.D.Tenn.1987). *See also Nassau-Suffolk Ice Cream, Inc. v. Integrated Resources, Inc.,* 114 F.R.D. 684, 689 (S.D.N.Y.1987) (Rule 11 requires the court to impose sancions "[w]hen it is obvious from the inadequacies of the proposed pleading that plaintiff's counsel engaged in little or no preliminary factual and legal investigation before filing a proposed pleading"). Similarly, "[b]lind reliance on the client is seldom a sufficient inquiry" and sanctions will be imposed if counsel does not take the time to make an inquiry of his own. *Southern Leasing Partners, Ltd. v. McMullan,* 801 F.2d 783, 788 (5th Cir.1986). *Accord Fleming Sales Co., Inc. v. Bailey,* 611 F.Supp. 507, 519 (N.D.Ill.1985) (lawyers have a responsibility to confer with their clients as to the facts "and not to accept the client's version on faith, but to probe the client in that respect ('reasonable inquiry')").

[4] The instant case had obviously not proceeded to a stage where the court can determine, based on its own examination of the facts, whether the original complaint was warranted. Plaintiff's attorney has admitted, however, that it was not until after the original complaint was filed that he conducted a factual inquiry allowing him to plead plaintiff's claims with sufficient particularity.[6] Thus, the state-

---

6 The court believes this point is especially important in the instant case, where fraud and criminal activity are alleged. Although plaintiff may have had an "idea" that the claims were warranted, a complaint alleging fraud may be dismissed if not pled with sufficient particularity. *See* Fed.R.Civ.P. 9(b).

ments contained in Plaintiff's Suggestions in Opposition to Defendants Motion to Dismiss are essentially admissions of violations of Fed.R.Civ.P. 11.

Even if, however, the court found that plaintiff had established that a reasonable basis existed for the filing of the original complaint, the court would find that sanctions must be assessed based on the Rule 11 language prohibiting the filing of a pleading for an improper purpose. As noted earlier, plaintiff admits that the pleading was filed to coincide with the sentencing of one of the defendants and that plaintiff made absolutely no effort to serve the complaint after it was filed. From these two admissions the court can reasonably conclude that the complaint was filed solely to attract publicity to plaintiff's claims and to harass defendants, and not because plaintiff's attorney had conducted an inquiry revealing that the claims had a reasonable basis in law or in fact.

Indeed, the mere fact plaintiff filed a complaint without attempting to serve it within the 120 day period constitutes evidence that Rule 11 sanctions are appropriate. In *Ordower v. Feldman*, 826 F.2d 1569 (7th Cir.1987), the Seventh Circuit affirmed the district court's award of Rule 11 sanctions when plaintiffs did not serve defendants until more than 150 days after filing their complaint. *Id.* at 1570. Like plaintiff in the instant case plaintiffs in *Ordower* attempted to serve defendants after the 120 day service period of Fed.R.Civ.P. 4(j) had expired. The appellate court affirmed the district court's finding that "plaintiffs vexatiously and unreasonably multiplied the proceedings by serving [defendant] even though [they] must have been aware that [defendant] would move to dismiss under Rule 4(j). . . ." *Id.* at 1574.

The fact that plaintiff's filing of the complaint harassed defendants also warrants Rule 11 sanctions. *See, e.g., Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir.1986); *Teradyne, Inc. v. Clear Communications Corp.*, 707 F.Supp. 353, 357 (N.D.Ill.1989). In the instant case the court concludes that plaintiff's failure to attempt service within the 120 day period combined with plaintiff's attorney's admissions that the majority of his inquiry into the facts and

law surrounding this case did not occur until he began drafting the amended complaint, justifies the imposition of Rule 11 sanctions. Although defendants' attorneys have filed affidavits detailing the fees and costs incurred as a result of the filing of the instant lawsuit, the court will not make a specific sanction award until plaintiff's attorney has had an opportunity to respond to the material contained in those affidavits. Accordingly, it is

ORDERED that defendants' motion to dismiss for failure to serve plaintiff within 120 days are granted. This case is dismissed without prejudice. It is further

ORDERED that defendants' motion for Rule 11 sanctions are granted. It is further

ORDERED that plaintiff's attorney respond to the affidavits submitted by defendants' counsel within fifteen days of the date of this order. It is further

ORDERED that defendants' motion to quash service of the amended complaint are granted. It is further

ORDERED that plaintiff's motion for default judgment against defendant David Schlee is denied. It is further

ORDERED that plaintiff's motion for sanctions against defendant David Schlee is denied.

APPENDIX E

RULE 35. ASSIGNMENT OF CASES

Unless otherwise provided in an Administrative Order approved by the Court en banc, the assignment of newly filed criminal and civil matters shall be by blind draw among the qualified judges. Judges shall be considered qualified unless they have given blanket recusal instructions to the Clerk in writing. However, any judge may enter an order in any case at the request of or in the event of unavailability of the judge to whom the case is assigned. Cases may be transferred between judges by mutual consent. Cases on a joint trial docket may be reassigned in order to promote their prompt and efficient disposition. If a case that has been dismissed is refiled, the refiled case shall be assigned to the judge last handling the dismissed case. Related cases, by mutual consent of the judges to whom the cases are assigned, shall be transferred to the judge with the lowest numbered case.

(Adopted Aug. 17, 1988, effective Aug. 17, 1988.)

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-208

DORETHA BRYANT
Petitioner,

vs.

BROOKLYN BARBECUE CORPORATION, et. al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner.

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including October 15, 1991.

/s/ HARRY A. BLACKMUN
Associate Justice of the Supreme
Court of the United States

Dated this 18th day
of September, 1991.